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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6190 OF 1996

M/s. Amarsey Damodar ... Petitioner

V/s

1. Rashtriya Cotton Kamgar Genenral Union,
Cotton Exchange Bldg., Cotton Green,
Mumbai - 400 033;

2. The Presiding Officer,
First Labour Court, Mumbai. ... Respondents

ALONGWITH
WRIT PETITION NO. 1286 OF 1997

Rashtriya Cotton Kamgar General Union,
Cotton Exchange Bldg., Cotton Green,
Mumbai - 400 033. ... Petitioner

V/s

1. M/s. Amersey Damodar, Mumbai;
2. Presiding Officer,
First Labour Court, Mumbai. ... Respondents

Mr.V.P.Vaidya for the petitioner in W.P.No.6190 of 1996 and for the Respondent No.1 in W.P.No.1286 of 1996.

Mr.S.N.Deshpande for the Respondent No.1 in W.P.No.6190 of 1996 and for the petitioner in W.P.No.1286 of 1997.

CORAM: SMT. NISHITA MHATRE, J.

DATED: 19TH SEPT., 2007.

ORAL JUDGMENT:

1. The petitions deal with the termination of services

of Manohar B. Vibhute and Baban D. Avad (for convenience they will be henceforth referred to as "the workmen"). (Hence forth, the petitioner in Writ Petition No. 6190 of 1996 will be referred to as "the management" and the petitioner in Writ Petition No. 1286 of 1997 will be referred to as "the Union"). Vibhute was appointed by the management on 1.4.1984. According to the management, Vibhute was employed as an Upcountry Clerk by them on 1.10.1984 while Avad was appointed as a Peon. The Union has contended that Vibhute was employed as "Ankdawala" and Avad was employed as "Number Marker".

2. On 31.5.1986, letters were issued by the management to both the workmen informing them that the management had decided to reduce its local cotton business and consequently their services would stand terminated on 30.6.1986. However, the management offered to accommodate them in its sister concern from 1.7.1986 at the same salary which was being paid to them. It was made clear that, if the workmen did not wish to join the sister concern, their services would be retrenched w.e.f. 30.6.1986. According to the management, the workmen signed the letters and returned them indicating their acceptance of the offer made by the management to accommodate them in their sister concern. It is the

case of the management that the workmen stopped reporting for duty from 20.6.1986. The workmen did not report for work with the sister concern of the management on 1.7.1986.

3. A demand was raised by the Union on behalf of the workmen for their reinstatement in service. After the conciliation proceedings failed, the demand was referred for adjudication before the Labour Court. A statement of claim was filed by the Union on behalf of the workmen wherein it was contended that they were working as Ankdawala and Number Marker, respectively. It was also pleaded that the management has terminated their services on 30.6.1986 without following the due process of law. The Union also mentioned in their statement of claim that the workmen were paid wages at a lower rate than their entitlement. It was contended that the workmen were covered by a settlement which was entered into between the Bombay Cotton Merchants and Muccadams' Association and the Union. The Union contended that the services of the workmen had been terminated without following the provisions of Section 25F of the Industrial Disputes Act.

4. In the written statement, the management has stated that the settlements which were referred to by the Union

in the statement of claim were not applicable to the workmen who were employed in the head office. According to the management, the settlements were applicable only to the workmen working in the Sewri Godown. The management denied that the workmen were employed in the Sewri Godown at any point of time. According to the management, from 20.6.1986 Vibhute remained absent and neither of the workman reported for duty with the sister concern from 1.7.1986 as a result of which their services stood terminated from 30.6.1986.

5. Evidence of both the parties was led before the Labour Court. Vibhute, in his affidavit filed in lieu of the examination-in-chief has stated that he was working in the capacity as an "Ankdawala" but was not paid wages payable to an "Ankdawala" in terms of the second agreement between the Bombay Cotton Merchants and Muccadams' Association and the Union. In his cross-examination Vibhute has admitted that the office of the management is situated in Ballard Pier. He has also admitted that a separate wage register was maintained for the Sewri godown and the office at Ballard Pier. He claimed that he used to be paid wages at Sewri. The witness also admitted in his cross-examination that he did not join duty with the sister concern as offered by the management. Avad in

his affidavit in lieu of examination-in-chief has reiterated the allegations made by Vibhute. He has given details about his employment with the management as the Number Marker. In his cross-examination he has stated that he was paid wages at the Ballard Pier office and that he used to mark his attendance at both, the Sewri godown and the head office. He denied that he was working as a Peon of the management and instead stated that he had been employed as a "Number Marker".

6. The management examined Ashokkumar Mohanlal Shah who was the Manager at the relevant time. He has admitted that Vibhute had signed the weight and sample register, in the capacity of an Ankdawala. The Manager has also admitted that, by terminating the services of the employees, retrenchment compensation and notice pay were not paid to the workmen. He has also admitted that the management had not specified the post which was offered to the workmen in the sister concern.

7. The Labour Court, by its award dated 30.8.1996 has allowed the reference partly. It has held that the workmen are entitled to reinstatement with continuity of service and 50% of back wages w.e.f. 30.6.1986. The Labour Court had concluded that the services of the workmen were terminated on 30.6.1986 without giving

reasons and notice pay or retrenchment compensation. The Labour Court came to the conclusion that the jobs offered to the workmen in the sister concern did not interest the workmen and they had therefore refused to join the sister concern. The Labour Court has held that Vibhute was employed as an "Ankdawala" and Avad was employed as a "Number Marker". This inference was drawn by the Labour Court on the basis of the evidence of the Manager.

8. Mr. Vaidya, learned advocate appearing for the management submits that the Labour Court has erred in concluding that the services of the workmen had been terminated contrary to law. He submits that by letter dated 31.5.1986, the management while terminating the services had offered the workmen alternate jobs in its sister concern from 1.7.1986 with pay protection. He submits that the letter of 31.5.1986 calls upon the workmen to sign the letter in the event they agreed to the offer of the management to accommodate them in its sister concern. The workmen had returned the letters after signing them which implied that they had accepted the offer. The learned advocate candidly agreed that retrenchment compensation was not paid to the workmen. However, he submits the very fact that the workmen had signed the letter dated 31.5.1986, indicated their

acceptance of the proposal to accommodate them in the sister concern. Therefore, the question of payment of retrenchment compensation did not arise. He submits that, on 20.6.1986 Vibhute remained absent and from 1.7.1986 when the management expected them to report for duty in the sister concern, the workmen stayed away from work. The learned advocate then submits that assuming it is held that there was in fact a termination of service by way of retrenchment from 31.6.1986, back wages ought not to have been awarded by the Labour Court. He submits that the workmen had been given an offer of gainful employment by the management after their services stood terminated from 31.6.1986. This factor, according to the learned advocate, would indicate that the workmen were not entitled to back wages as they did not accept the offer. He relies on the judgment in the case of **Kamleshkumar Ishwardas Patel v/s Union of India and ors., reported in 1995(2) Bom.C.R. 640 and in the case of Gansons Engineers Pvt. Ltd. v/s Shriram Y. Chhatre, reported in 1999 (82) F.L.R. 494.** He further submits that the law in respect of payment of back wages has undergone a drastic change. The Supreme Court has now taken the view that it is for the workmen to prove that he is not gainfully employed, according to the learned advocate. He points out that back wages are not to be paid in a mechanical and

perfunctory manner. He relies on the judgment in the case of **General Manager, Haryana Roadways v/s Rudhan Singh, reported in (2005) 5 SCC 591,** in support of his submission that back wages need not be awarded as a matter of course on reinstatement. The learned advocate also submits that there is no work available for the workmen as the business of cotton trading is not carried out in the manner that it was earlier.

9. The learned advocate for the Union has submitted that the Labour Court has found that Vibhute worked as "Ankdawala" while Avad was working as "Number Marker". They were not being paid wages which they were entitled under the settlement. He submits that, it is because the workmen demanded the applicability of the settlement and the wages payable under the settlement, that the management decided to terminate their services. He submits that there is a clear finding of fact that no retrenchment compensation was offered to the workmen when their services were terminated and that they are therefore entitled to reinstatement as held in a catena of judgments. He then submits that the workmen must be paid full wages on their reinstatement. According to the learned advocate, offering a job in a sister concern is not a remedy for the hardship caused to the workmen; the workmen must be paid full back wages on

reinstatement. He then submits that the offer of an alternative job to the workmen was just an eyewash as there were no particulars mentioned in the letter dated 31.5.1986. According to the learned advocate there was a dispute regarding the wages payable to the workmen. Therefore, it was not possible for the workmen to accept the job in the sister concern at the same rate of wages which they were being paid. He then submits that the law in respect of awarding back wages as it was laid down earlier would govern the present case. The trend of shifting the onus on the workman to prove his case for payment of back wages has started very recently, according to the learned advocate. The present case would not be governed by these judgments. He submits that the case of the **Hindustan Tin Works Pvt. Ltd. v/s Its employees, reported in 1978 II L.L.J. 474,** was decided by a Bench of two Judges and the same issue was answered by a majority in the case of **Gujarat Steel Tubes Ltd. v/s Gujarat Steel Tubes Mazdoor Sabha, reported in 1980 I L.L.J. 137.** According to the learned advocate, the judgment of **Hindustan Tin Works Pvt. Ltd. (supra)** should be preferred over the judgment in the case of **U.P. State Brassware Corpn. Ltd. & anr. v/s Uday Narain Pandey, reported in (2006) 1 SCC 479** and other recent judgments in relation to awarding back wages. He submits that, when there is a

conflict of decisions of the Supreme Court of co-ordinate Benches of equal strength, the High Court must decide for itself which judgment should be followed, based on the consideration of law on the point. He submits that the later judgment need not necessarily be followed in preference to the earlier one. He relies on the full Bench judgement of this Court in **Kamleshkumar I. Patel v/s Union of India, reported in 1995(2) Bom.C.R. 640** in support of this submission. As regards the offer made for jobs in the sister concern, the learned advocate submits that the workmen were not bound to accept these jobs as held by the learned Single Judge of this Court in the case of **S.M.Renu v/s The Proprietor, Mahajan Silk Mills & ors. reported in 1992 II C.L.R. 408.** The view taken by the Court in the aforesaid judgment has been reiterated in the case of **Firth (India) Steel Co. Ltd. v/s Industrial Court, Maharashtra & ors., reported in 1990 (1) L.L.N. 172**. He then submits that it is not in every case that the workman must be denied back wages as held by the Supreme Court in the case of **J.K. Synthetics Ltd. v/s K.P.Agrawal & anr., reported in 2007 I C.L.R. 670.**

10. On perusal of the evidence on record and the letter dated 31.5.1986, in my view, the services of the workmen

came to an end on 30.6.1986. The fact that the management had offered work to the employees in their sister concern would not be any indication that there was no termination of service by the management. There, in fact, has been a termination on 30.6.1986. Admittedly, retrenchment compensation was not paid to the workmen although they were given one month's notice as required under Section 25F of the Industrial Disputes Act. Therefore, the workmen would be entitled to reinstatement in service.

11. The question which remains is whether the workmen have, by refusing the offer for employment in the sister concern, forsaken their right to the back wages. In the case of **Gansons Engineers Pvt. Ltd.** (supra), the workmen were terminated from service and they were offered employment at Nasik or were directed to accept retrenchment compensation. The option was neither exercised nor did the workmen join at Nasik. The Court has held in these circumstances that there was no termination of service and, therefore, back wages need not be directed to be paid. However, in that case, since the workman had been reinstated in Nasik during the pendency of the petition, the Court did not interfere with the award, but modified it by setting aside the direction for payment of back wages. In the

case of **General Manager, Haryana Roadways** (supra), the Supreme Court has observed that while awarding back wages it is not a rule of thumb that in every case the Tribunal finds that there is a violation of Section 25F of the Industrial Disputes Act that full back wages must be awarded. The Supreme Court has held that payment of back wages should be decided on a host of factors including the nature of appointment, qualifications of the workman, length of service and availability of alternative work. It has been submitted by the learned advocate for the management that both the workmen were employed hardly for two years with the management and, therefore, they are not entitled to back wages even on this count. Besides this, the workmen have been paid wages under Section 17B of the Industrial Disputes Act. In my view, the submission of the learned advocate is well founded. Back wages must be awarded taking into consideration various factors. In the present case, there is no evidence on the question of gainful employment during the period of their unemployment with the management. In my view, it would be appropriate therefore to remand the reference only for the purposes of determining the back wages payable to the workmen.

12. The impugned award regarding reinstatement and continuity of service is confirmed. The reference is

remanded to decide whether the workmen are entitled to any back wages. The Labour Court shall decide this issue on the basis of evidence already on record and any further evidence which the parties may desire to lead. The Labour Court shall pass an award with respect to back wages, within three months from today.

13. Both petitions disposed of accordingly.

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